

MINUTES OF THE
132ND MEETING OF THE
WATER MANAGEMENT BOARD
FLOYD MATTHEW TRAINING CENTER
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA

MARCH 3, 2004

CALL TO ORDER: Chairman Leo Holzbauer called the meeting to order at 8:30 a.m. CST. A quorum was present.

The following were present at the meeting:

Board Members: Leo Holzbauer, Rodney Freeman, Bernita Loucks, Francis Brink, Dwayne Rollag, and Marian Gunderson.

Department of Environment & Natural Resources (DENR): Steve Pirner, DENR Secretary; Garland Erbele, Eric Gronlund, Ken Buhler, Mark Rath, Stacy Johnson, Genny McMath, Karen Schlaak, Don Stroup, Gale Selken, Tim Schaal, Jim Goodman, and Lynn Beck, Water Rights Program.

Attorney General's Office: Diane Best, John Guhin, and Roxanne Giedd.

Legislative Oversight Committee: Representative Lou Sebert, Mitchell; Representative Dale Hargens, Miller; and Senator Frank Kloucek, Scotland.

Cancellation of Water Right No. 2995-3: Roland Kleinschmidt, Lee Kleinschmidt, and Keith Krull, Harrold.

Water Permit No. 3467-3: Jon Gilbert, Ipswich, and Paul Wipf, Frankfort.

Water Permit No. 6201A-3 and 6334C-3: Floyd Peterson, Danny Peterson, and Brad Peterson, Hitchcock.

Water Permit No. 1504-3: David Mendel, Doland.

Water Permit No. 1504A-3 and 1504B-3: Harvey Wollman and Allen Wipf, Frankfort; Larry Wipf, Doland.

APPROVE MINUTES FROM DECEMBER 3, 2003, MEETING: Motion by Gunderson, seconded by Brink, to approve the minutes from the December 3, 2003, Water Management Board meeting. Motion carried.

MAY BOARD MEETING: The next Water Management Board meeting is May 12 and 13, 2004, in Pierre.

STATUS AND REVIEW OF WATER RIGHTS LITIGATION: John Guhin reported that the case of Parks versus Cooper involved three bodies of water in Day and Clark counties. These have historically been sometimes dry and sometimes marshy. At this time, they are lakes - Long Lake, Parks Slough, and Shiley Slough.

Long Lake is now about 2,600 surface acres and 15 feet deep at its deepest, Parks Slough is now about 245 surface acres and 30 feet deep at its deepest, and Shiley Slough is about 625 surface acres and 13 deep at its deepest. None of these were meandered when the U.S. Geological Survey surveyed in the 1870's and 1880's. The state, which was the defendant in this case, conceded that the beds of the lakes belonged to the landowners. The question before the Circuit Court and, ultimately, the South Dakota Supreme Court, was whether the waters in those lakes are public waters.

Mr. Guhin distributed copies of the Supreme Court opinion filed on February 25, 2004. The Supreme Court concluded that all water in South Dakota belongs to the people in accord with the public trust doctrine and as declared by statute and precedent, although the lake beds are mostly privately owned, the water in the lakes is public and may be converted to public use, developed for public benefit, and appropriated in accord with legislative direction and state regulation.

Mr. Guhin noted that the Supreme Court did not answer the question of how the water in these particular lakes could be used. The court said these are public waters, but they are not public waters of a meandered lake. Mr. Guhin interprets this to mean that maybe the legislature and the state want to deal differently with public waters on meandered lakes and non-meandered lakes, and the legislature can make that determination.

In paragraph 51 of the opinion, the Supreme Court states that the Water Resources Act does not explicitly grant to the Water Management Board the responsibility to determine recreational use of public waters. Nonetheless, because the Water Resources Act and the Water Resources Management Act are the provisions governing public water lying on or under private property, the Department of Environment and Natural Resources is the agency at present given oversight of these lakes.

Mr. Guhin said this is a very important case. It affirms and reinforces the approach that the Water Management Board has taken in treating all waters, including ground water, as public waters of the state and protecting the water for the future use of the state.

Responding to a question from Mr. Brink, Mr. Guhin stated that the Supreme Court did not determine how these waters can be used. In general, if public water is accessible from public property or from a road, it can be used by the public.

ADMINISTER OATH TO DENR STAFF: Chairman Holzbauer administered the oath to DENR staff who intended to testify during the board meeting.

APPOINTMENT OF RAPID VALLEY WATER MASTER: Stacy Johnson reported that the Rapid Valley Water Conservancy District and the City of Rapid City have requested that Duane Scott be appointed as the water master for the 2004 irrigation season.

Motion by Gunderson, seconded by Brink, to appoint Duane Scott as the Rapid Valley Water Master for the 2004 irrigation season. Motion carried.

WELL DRILLER/PUMP INSTALLER LICENSE RENEWAL ISSUES: Ken Buhler reported that the Water Management Board adopted rules that require continuing education for the renewal of well driller and pump installer licenses. In the process of renewing the 2004 licenses, the department discovered that some of the license holders did not complete their continuing education last year. There were 166 licensed drillers in South Dakota last year. To date, the department has received 140 license renewal applications and issued 117. Mr. Buhler stated that 11 of the 166 licensed drillers failed to complete their continuing education credits for various reasons.

Mr. Buhler noted that since this is the first year that continuing education has been required, the department was looking for guidance from the board as to actions to take regarding the license holders who did not complete continuing education.

The Water Management Board directed the Water Rights Program to contact the license holders and request that they submit a letter explaining the reasons for not getting the required continuing education. The board will consider this matter at its May 12-13, 2004, meeting. The Water Rights Program will also inform the license holders that they are welcome to appear at the May meeting to explain their reasons for not getting the continuing education, but that they are not required to appear as long as they submit a letter prior to the meeting.

Discussion took place regarding the well drillers license rules.

CONSIDER VIOLATIONS FOR FAILURE TO REPORT ON IRRIGATION

QUESTIONNAIRE: Genny McMath provided the board with her report on irrigation questionnaire violations.

On October 17, 2003, 2,927 irrigation questionnaires were sent by First Class Mail. The permit holders were given until December 2, 2003, to return the forms.

On January 14, 2004, 228 notices (involving 362 permits) were mailed to those irrigators who had not returned their irrigation questionnaires. All of the notices were sent by "signature confirmation requested" rather than using certified mail. When using "signature confirmation requested" the department receives verification that the notices were delivered and the recipients have signed for the notice, but it is done through the internet rather than the post office returning the green cards.

The follow-up notices advised the permit holders that the board could take one or more of the following actions pursuant to SDCL 46-1-12 and SDCL 46-1-14:

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- The permit(s) could be suspended for:
 1. A period of up to one year for the first violation; or
 2. A period of up to three years for the second violation, which includes one previous violation.
- The permit(s) could be canceled for three violations, which includes at least two previous suspensions;
- The permit(s) could be amended to include the mandatory irrigation questionnaire qualification;
- Postpone any action or take no action.

The Water Rights Program recommended that the board take the following action for those permits with irrigation questionnaires not received by March 3, 2004:

Suspend the following permits/rights for one year: No. 3451-3, Martin Bertrand; No. 4535-3, Dwight Brenner, Operator; No. 2366-3, Wayne W. Brown; No. 2453-3, Jack & Gale Coleman; No. 3332-3, John W. Collins; No. 1362-2 and No. 1363-2, Oakley Eide; No. 1365-2, Eide & Matucka; No. 6165-3, Alex A/Ann L. Falk; No. 5552-3, Kellen & Streit, Inc.; No. 3198A-3, J. V. Kenneally; No. 5353-3, Michael A. Koslowski; No. 2480A-3, Dennis H. & Jackie McDowell; No. 1723-2, Tim Palmer; No. 921-1, Wendelyn Richter; No. 1080-2, Schell Ranch; No. 2696-3A, No. 4414-3, and No. 4658-3, Donald Schmidt; No. 6073-3, Six Mile Creek Golf Course; No. 2464-3, John R. Talsma; and No. 1554-1, Stanley Wood.

Suspend the following for three years: No. 932-2, Wayne Sanderson.

Amend the following to add the Irrigation Questionnaire Qualification: No. 1487-2, Lee Ahrlin; No. 1473-2 and No. 1502-2, Randy Bachelor, Mgr.; No. 4528-3, Dwight Brenner, Operator; No. 2821-3, Linn Dickson; No. 1530-2, Vern Keszler; No. 981-1, Troy Krisle; No. 2518-3, Lakeside Country Club; No. 113-3 and No. 113-3A, Randy & Patti Nash; No. 3311-3, Kirby Oswald; No. 1132-1, Ezra Pauley; No. 2521-3 and No. 2934-3, Pembroke Hutterian, Inc.; No. 1795-3, RT Investments 2001 LLC; and No. 470A-1, Stanley Wood.

Motion by Freeman, seconded by Loucks, to follow the recommendations for suspension and amendment of the permits/rights. Motion carried.

LEGISLATIVE UPDATE: Steve Pirner, Secretary of DENR, provided an update on the 2004 Legislative Session.

NEW WATER PERMIT APPLICATIONS: The pertinent qualifications attached to approved water permit applications throughout the hearings are listed below:

Well Interference Qualification

The well(s) approved under this permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under this Permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.

Well Construction Rule Qualification No. 1

The well(s) authorized by Permit No. _____ shall be constructed by a licensed well driller and construction shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) from the producing formation to the surface pursuant to Section 74:02:04:28.

Well Construction Rule Qualification No. 2

The well(s) authorized by Permit No. _____ shall be constructed by a licensed well driller and construction shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.

Irrigation Water Use Questionnaire Qualification

This permit is approved subject to the irrigation water use questionnaire being submitted each year.

Low Flow Qualification

Low flows as needed for downstream domestic use, including livestock water and prior water rights must be by-passed.

UNOPPOSED NEW WATER PERMITS ISSUED BY THE CHIEF ENGINEER WITHOUT A HEARING BEFORE THE BOARD: See attachment.

WATER PERMIT APPLICATION NO. 43C-1, SD DEPARTMENT OF GAME, FISH AND PARKS: Diane Best provided the board with photographs of Spearfish Falls taken in 1890 and 2003.

Ms. Best stated that Richard Fort intervened in support of this application.

Don Stroup presented his report on the application.

The application proposes to amend Water Permit No. 43B-1 to provide 20 cfs year round in-stream flow in the segment of Little Spearfish Creek from the present diversion dam to the Spearfish Creek confluence, and then in Spearfish Creek to the intake site for Hydropower plant No. 1 near Maurice, South Dakota. Water Permit No. 43B-1 was originally granted to Homestake Mining Company.

Water Right No. 43-1 and Water Permit No. 43A-1 were amended by Water Permit 43B-1 to provide in stream flow on portions of Little Spearfish and Spearfish Creeks during the annual July 1 to September 30 period. Homestake Mining Company's Water Right No. 137-1 was limited to only the diversion of flow in excess of 20 cfs into the aqueduct at the Little Spearfish

Creek diversion dam during the months of July, August, and September of each year for power generation at Hydropower Plant No. 2.

Homestake Mining Company transferred Water Permit No. 43B-1 to the SD Department of Game, Fish and Parks and abandoned the Little Spearfish Creek intake authorized by Water Right No. 137-1 after the SD Department of Transportation completed construction of a new culvert on Highway 14A to accommodate the increased flow of water in Little Spearfish Creek. The Department of Game, Fish and Parks will renovate the small diversion dam to reclaim lost depth and repair minor structural defects. The Department of Game, Fish and Parks intends to maintain the dam as a small pond fishery.

Mr. Stroup noted that this amendment will not infringe on any prior water rights on Little Spearfish Creek or Spearfish Creek.

The chief engineer recommended approval of Application No. 43C-1 with the following qualification:

Water Permit No. 43C-1 amends Water Permit Nos. 43A-1 and 43B-1 and Water Right No. 43-1 without an increase in the appropriation authorized by Water Right No. 43-1.

Diane Best stated that Mr. Fort and Mr. Cole had filed an action with the Federal Energy Regulatory Commission (FERC) to have Homestake's power plants licensed. Mr. Fort and Mr. Cole raised the point that those power plants were originally constructed before the Federal Power Act came to be in 1920, and they were grandfathered in for hydropower for mining purposes. Mr. Fort and Mr. Cole claimed that if a mine is shut down, the power plant should either be shut down or licensed for some other purpose. Homestake suggested to FERC that the grandfather ought to apply no matter what eventual end use the power was being put to. FERC held against Homestake and required them to get licensed within three years. Homestake's three-year period is over half up. There have been discussions regarding what should be done with the two power plants. Some of the water that has historically been diverted into the power plant in the canyon (Hydropower Plant No. 2) will no longer be diverted to provide hydropower. Ms. Best said the state has not been formally notified that the plant will shut down. The other plant (Hydropower Plant No. 1) is on the edge of Spearfish and negotiations are taking place with the city of Spearfish for the purchase of the aqueducts and to possibly obtain the FERC license.

Ms. Best presented the board with proposed Findings of Fact and Conclusions of Law for Water Permit Application No. 43C-1.

Motion by Rollag, seconded by Brink, to approve Water Permit Application No. 43C-1, SD Department of Game, Fish and Parks subject to the qualification set forth by the chief engineer. Motion carried.

WATER PERMIT APPLICATION NO. 6456-3, SOUTH LINCOLN RURAL WATER SYSTEM (RWS): Jim Goodman presented his report on the application.

The application proposes to appropriate 1.33 cfs (600 gpm) from a new well approximately 220 feet deep in Turner County. The water will be used at the ethanol plant in Chancellor.

Water Permit Nos. 6311-3 and 6435-3, combined, authorized 4.0 cfs from three wells with a total annual diversion of 900 acre-feet of water. Application No. 6456-3 proposes to construct an additional well for a total combined diversion rate of 5.33 cfs from four wells. No increase in the 900 acre-feet total annual limitation is authorized by this application.

The Upper Vermillion Missouri aquifer is a buried outwash (sand and gravel) that is under artesian conditions at this site. The aquifer underlies 200 square miles and contains an estimated 1.8 million acre-feet of water in storage in Turner and Hutchinson Counties. The aquifer appears to be hydraulically connected to the shallower Parker Centerville aquifer.

The Water Rights Program monitors 16 observation wells within a three mile radius of the application. Hydrographs for three of the observation wells are included in Mr. Goodman's report.

The chief engineer recommended approval of Water Permit Application No. 6456-3 with the Well Interference Qualification, Well Construction Rule Qualification No. 2, and the following qualifications:

1. Water Permit Nos. 6311-3 and 6435-3 and 6456-3, combined, authorize a total annual diversion of 900 acre-feet of water.
2. South Lincoln Rural Water System shall report to the chief engineer annually the amount of water withdrawn from the Upper Vermillion Missouri Aquifer.

Mr. Goodman noted that the department received no opposition to this application.

Motion by Gunderson, seconded by Rollag, to approve Water Permit Application No. 6456-3, South Lincoln Rural Water System, subject to the qualifications set forth by the chief engineer. Motion carried.

CANCELLATION CONSIDERATIONS: Eric Gronlund reported that 20 water permits/rights were scheduled for cancellation. The permit owners were notified of the hearing and the reason for cancellation. The department received letters from Roland Kleinschmidt and Lee Kleinschmidt opposing the cancellation of Water Right No. 2995-3. Mr. Gronlund noted that matter would be heard separately.

The following permits/rights were recommended for cancellation for the reasons listed:

Water Permit No. 1616-1 filed by One Diamond, Inc.; non-construction
Water Permit No. 1634-1 filed by Cris & Dianne Miller; non-construction
Water Permit No. 1649-1 filed by Black Hills Spring Water; non-construction
Water Right No. 731-2 filed by US Department of Agriculture - Forest Service;
abandonment/forfeiture

Water Permit No. 2193-2 filed by Golden Willow Seeds; abandonment
Water Permit No. 2430-2 filed by Joe Graziano; non-construction
Water Right Nos. 92-3, 93-3, and 94-3 filed by Ellwein Company; abandonment/forfeiture
Water Right No. 1028-3 filed by William M. Smith Estate; abandonment/forfeiture
Water Right No. 1336-3 filed by Charles Olson; abandonment/forfeiture
Water Right No. 1439-3 filed by Carlton Cassens now owned by Helen Zoss;
abandonment/forfeiture
Water Right No. 2542-3 filed by Darrel Jongeling; abandonment/forfeiture
Water Right No. 2737-3 filed by Strasburg, Inc.; abandonment/forfeiture
Water Right No. 4724-3 filed by Richard Eden now owned by Randy Eden;
abandonment/forfeiture
Water Right No. 4931-3 filed by Benson Hereford Ranch now owned by Bill Makens;
abandonment/forfeiture
Water Right No. 5467B-3 filed by SDSU Plant Science now owned by Terrance Hill;
abandonment/forfeiture
Water Right No. 5575-3 filed by Big Sioux Nursery, Inc.; abandonment
Water Right No. 5969B-3 filed by Keith A. Eidam now owned by SD Department of Game, Fish
and Parks; abandonment/forfeiture

Motion by Freeman, seconded by Brink, to cancel the water rights/permits for the reasons listed.
Motion carried.

CANCELLATION OF WATER RIGHT NO. 2995-3, ROLAND KLEINSCHMIDT: The chief engineer recommended cancellation of Water Right No. 2995-3 for abandonment and/or forfeiture.

A transcript of this hearing was prepared by the court reporter. A copy of the transcript and the exhibits are on file with the Water Rights Program.

Motion by Gunderson, seconded by Freeman, to cancel Water Right No. 2995-3, Roland Kleinschmidt. Motion carried.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION IN THE MATTER OF CANCELLATION OF WATER PERMIT NO. 3467-3, SPINK COLONY: Gregg Magera, attorney for Spink Colony, participated via telephone.

John Guhin prepared proposed Findings of Fact, Conclusions of Law and Final Decision for this matter.

Ms. Best submitted DENR's response to the proposed Findings of Fact, Conclusions of Law and Final Decision. Mr. Guhin had no objection to DENR's suggested changes.

Motion by Freeman, seconded by Gunderson, to adopt DENR's suggested changes. Motion carried.

Gregg Magera submitted Spink Colony's response to the proposed Findings of Fact, Conclusions of Law and Final Decision.

Mr. Magera stated that legal excuse exists for the colony's non-use of the water because the water was not compatible with the land. He asked the board to reconsider this matter and reverse its decision to deny the permit.

Mr. Guhin submitted a reply to Spink Colony's response. He recommended that the board reject the colony's suggested changes.

Motion by Freeman, seconded by Rollag, to adopt Mr. Guhin's reply to Spink Colony's response to the proposed Findings of Fact, Conclusions of Law and Final Decision. Motion carried.

Motion by Freeman, seconded by Rollag, to adopt the Findings of Fact, Conclusions of Law and Final Decision, as amended. Motion carried.

WATER PERMIT APPLICATION NO. 6445-3, SPINK COLONY: Jim Goodman presented his report on the application.

The application proposes to appropriate 1.94 cfs (870 gpm) from one well approximately 100 feet deep to irrigate 136 acres in Spink Colony. This application requests the same lands that were covered by Water Right No. 3467-3, which has been cancelled.

The Tulare East James aquifer is predominantly buried outwash (sand and gravel) in Spink and Beadle Counties. The Water Management Board has declared the aquifer fully appropriated based upon use.

Mr. Goodman stated that the Water Rights Program monitors two observations wells, SP-77L and SP-79G, located within two miles of this application. Hydrographs for these two wells are included in Mr. Goodman's report.

Mr. Goodman noted that water is not available from the Tulare East James aquifer.

The chief engineer recommended denial of Application No. 6445-3 because 1) SDCL 46-6-3.1 states that the annual withdrawal of ground water shall not exceed the average estimated annual recharge to the aquifer; 2) all water available for appropriation within the Tulare East James Aquifer in Spink and Beadle Counties is presently appropriated; and 3) it is not in the public interest because the unavailability of proven recharge capacity within the Tulare East James Aquifer.

Ms. Best offered DENR Exhibit 1, the department file on Application No. 6445-3. The exhibit was accepted into the record.

Mr. Magera stated that Mr. Goodman testified that in the last few years there has been a number of new applications somewhat similar to Spink Colony's where an existing water permit had been denied and a new application was filed. He asked Mr. Goodman when those new

applications were reviewed and was it considered that all existing permits were taking their water out of the aquifer.

Mr. Goodman answered that he assumed, based upon the irrigation questionnaires and other information, that everybody was diverting water.

Mr. Magera asked since Permit Application No. 3467-3 was denied, would water be available from the aquifer for the colony's Permit Application No. 6445-3.

Mr. Goodman stated that he does not believe water would be available. Mr. Goodman said he is concerned with the overall water use from the aquifer. Whether a person uses the water one year and not the next year, Mr. Goodman is considering the whole thing and looking at it in terms of the last 25 years. If the water had not been used for 10-15 years, simply the act of canceling it on paper does not constitute making water available for a new use. Water use that is being reported is already exceeding the average annual recharge.

Mr. Magera urged the board to consider approving the application because the colony can now make beneficial use of the water.

Mr. Magera moved that the transcript from the October 1, 2003, forfeiture hearing be entered into the record for this matter. Mr. Holzbauer accepted the transcript into the record.

Motion by Freeman, seconded by Brink, to deny Water Permit Application No. 6445-3, Spink Colony for the reasons listed in the chief engineer's recommendation. Motion carried.

Mr. Guhin will prepare proposed Findings of Fact, Conclusions of Law and Final Decision.

WATER PERMIT APPLICATION NO. 6201A-3, PETERSON FARMS AND IN THE ALTERNATIVE, NO. 6334C-3, PETERSON FARMS: Jim Goodman presented his report on the application.

The application proposes to amend Water Permit Nos. 6201-3 and 6343-3 by severing a portion of these permits and simultaneously transferring to other land. Water Permit No. 6201-3 appropriates 6.85 cfs from three wells to irrigate 480 acres in Spink and Beadle Counties. Water Permit No. 6343-3 appropriates 4.57 cfs from two wells to irrigate 320 acres in Beadle County. Both of these permits are within the five-year time period to complete construction of works.

The applicant proposes to transfer the water and permitted acres (the corners) that will not be irrigated on five permitted quarter sections by utilizing standard 132 acre center pivots on each quarter section. Twenty-eight acres each from four of the authorized quarter sections and twenty three acres from the NW $\frac{1}{4}$ of Section 11, T1 13N, R63W are proposed to be transferred. The appropriation of water that will be transferred in 1.93 cfs for irrigation of 135 acres from a 70-90 feet deep well located in the center of the SW $\frac{1}{4}$ of Section 22, T1 14N, R63W in Spink County. The irrigated acreage is also in the SW $\frac{1}{4}$ of Section 22 and the water source for all the permits is the Tulare Hitchcock aquifer. No increase in diversion rate of permitted acreage is authorized by this application.

The Tulare Hitchcock aquifer is a surficial outwash (sand and gravel) that is under water table conditions in this area. Total recharge to the aquifer is approximately 10,360 acre-feet annually. This calculation uses a recharge rate of 0.83 inches per year.

The Water Management Board has deferred a number of water permit applications from the aquifer because of concerns about water availability. These applications were deferred in December of 2002 after a number of permits were approved with the understanding that after five years (allowing for development of the newly granted permits) the deferred applications could be considered again.

Mr. Goodman's report includes a hydrograph for observation well SP-80F, which is located within one mile of this proposed irrigation well. Water levels for the observation well show good response to climatic conditions.

There is an existing water permit No. 6312-3 located within $\frac{1}{2}$ mile of this application. Interference is not a concern. The two irrigation wells should be about $\frac{1}{2}$ mile apart. Drawdown created by pumping is not expected to be significant at this distance between wells.

Mr. Goodman stated that this transfer can be accomplished under SDCL 46-5-34. There is no increase in acres or increase in diversion rate allowed by this application.

The chief engineer recommended approval of Application No. 6201A-3 with the Well Interference Qualification, Well Construction Rule Qualification No. 2, Irrigation Water Use Questionnaire Qualification, and the following qualification:

The approval of Water Permit No. 6201A-3 withdraws Application No. 6334C-3 from consideration.

Mr. Goodman noted that the department received no opposition regarding this application.

Motion by Freeman, seconded by Brink, to approve Water Permit Application No. 6201A-3, Peterson Farms, subject to the qualifications set forth by the chief engineer.

Marian Gunderson said she was not sure she agreed with approving this application.

The motion carried. Gunderson cast the only dissenting vote.

Dan Peterson was administered the oath and testified that Application No. 6334C-3 filed by Peterson Farms was being withdrawn.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION

Denial Of David Mandel's Application For A SD Well Drillers License: Motion by Freeman, seconded by Rollag, to adopt the Findings of Fact, Conclusions of Law and Final Decision in the matter of the well driller license application of David S. Mandel. Motion carried.

Cancellation of Water Right Nos. 325-3, 1253-3, and 4260-3, Roger Chaplin: Motion by Freeman, seconded by Gunderson, to adopt the Findings of Fact, Conclusions of Law and Final Decision in the matter of the cancellation of Water Right Nos. 325-3, 1253-3, and 4260-3, Roger Chaplin. Motion carried.

Water Permit Application No. 6234-3, South Lincoln Rural Water System: Motion by Freeman, seconded by Loucks, to adopt the Findings of Fact, Conclusions of Law and Final Decision in the matter of Water Permit Application No. 6234-3, South Lincoln Rural Water System. Motion carried.

Water Permit Application No. 6403-3, Rick Even: Mr. Guhin noted that the Water Rights Program did not submit suggested changes. Patricia Carlson, attorney for Mary Ellen McGill and Mary Ellen McGill Trust, submitted objections to the proposed Findings of Fact, Conclusions of Law and Final Decision.

Mr. Guhin submitted a response recommending rejection of the objections.

Motion by Freeman, seconded by Gunderson, to reject the McGill's objections. Motion carried.

Motion by Freeman, seconded by Rollag, to adopt the Findings of Fact, Conclusions of Law and Final Decision in the matter of the application for Water Permit No. 6403-3, Rick Even.

Mr. Brink requested that in Finding of Fact No. 9, line 3, the words "need to" be added so it reads, "may need to be."

Amended motion by Freeman, seconded by Gunderson, to accept Mr. Brink's suggestion. Motion carried.

The motion to adopt the amended Findings of Fact, Conclusions of Law and Final Decision. Motion carried.

Water Permit Application No. 6414-3, Andy Weber: Mr. Guhin pointed out the same change that was made to the Rick Even findings. This change should be made in Finding of Fact No. 8.

Mr. Guhin stated that the Water Rights Program did not submit suggested changes. Patricia Carlson, attorney for Mary Ellen McGill and Mary Ellen McGill Trust, submitted objections to the proposed Findings of Fact, Conclusions of Law and Final Decision.

Mr. Guhin submitted a response recommending rejection of the objections.

Motion by Freeman, seconded by Gunderson, to reject the McGill's objections, accept the change in Finding of Fact No. 8, and to adopt the Findings of Fact, Conclusions of Law and Final Decision in the matter of the application for Water Permit No. 6414-3, Andy Weber. Motion carried.

Denial of Water Permit Application No. 6431-3, Phillip Hines: Mr. Guhin prepared the proposed Findings of Fact, Conclusions of Law and Final Decision. He stated that the department submitted a response with its suggestions, which are numbered 2, 3, 4, and 5.

Mr. Guhin recommended that the board adopt the department's suggested changes as shown in Nos. 2 and 4 of the department's response. He recommended rejecting the department's suggested change in No. 3. Mr. Guhin concurred with the department's suggestion that a new Conclusion of Law should be added, but rather than the department's proposed language, he recommended that it read as follows:

3. The board has addressed its consistent position since 1981 regarding this aquifer. The board's Findings are not, however, based entirely on similar decisions in the past of whether it has made exceptions in the past. The board recognizes that the resolution of the issue of whether a particular water use is beneficial or in the public interest may change. However, evidence before the board in this specific case warrants the determination that water is not available for this application due to the water mining statute.

Motion by Freeman, seconded by Gunderson, to amend the board's proposed Findings of Fact, Conclusions of Law and Final Decision to include the department's proposals contained in Nos. 2, 4, and 5, as modified by the board's attorney. Motion carried.

Ray Rylance, attorney for Phillip Hines, submitted objections to the board attorney's proposed Findings of Fact, Conclusions of Law and Final Decision. He also submitted the applicant's proposed Findings of Fact and Conclusions of Law.

Mr. Guhin submitted board attorney's response to applicant's proposed Findings of Fact and Conclusions of Law.

Motion by Freeman, seconded by Gunderson, to amend the board attorney's proposed Findings of Fact, Conclusions of Law and Final Decision to reflect the board attorney's response to the applicant's proposed Findings of Fact and Conclusions of Law. Motion carried.

Motion by Freeman, seconded by Rollag, to adopt the amended Findings of Fact, Conclusions of Law and Final Decision in the matter of the application for Water Permit No. 6431-3, Phillip W. Hines. Motion carried.

CONSIDER CANCELLATION OF WATER RIGHT NO. 1504-3, DONALD MENDEL: Diane Best offered the following exhibits:

DENR Exhibit 1 - Area Map

DENR Exhibit 2 - Department file for Water Right No. 1504-3

DENR Exhibit 3 - Water Use Records in the Vicinity of Water Right No. 1504-3 (since 1983)

DENR Exhibit 4 - Water Use History (1983-2003) for Water Right No. 1504-3

The exhibits were accepted into the record.

Responding to questions from Diane Best, Don Stroup testified that he conducted on-site investigations in the Tulare East James aquifer area. Mr. Stroup stated that he drove along Mr. Mendel's property and found no sign of irrigation equipment or that irrigation had been conducted. Mr. Stroup said he had visited with Mr. Mendel, who stated that he had not been irrigating and he was getting ready to retire.

Mr. Stroup stated that he conducted investigations in the area three times - in early spring, later in the spring, and in August 2003.

Eric Gronlund testified that he had received telephone calls from Harvey Wollman and Mr. Mendel indicating that they would like to transfer this water right to other lands. Staff discussed the past history of use of this water right and explained the law regarding abandonment and forfeiture.

Mr. Gronlund stated that Water Right No. 1504-3 has a priority date of February 9, 1968 and was licensed in 1973. The water right appropriates 2.22 cfs to irrigate 370 acres in Spink County. The well (Tulare East James Aquifer) is located in the SE ¼ NE ¼ Section 15, T115N, R61 W and the irrigated acreage is located in portions of the W ½ Section 14 and NE ¼ of Section 15, T115N, R61 W. This is located about eight miles east and eight miles south of Frankfort (along Highway 212 east of Redfield).

Mr. Gronlund noted that the irrigation questionnaire records (DENR Exhibit 4) indicate no irrigation from 1991 through the present. The comments Mr. Mendel included on each questionnaire are shown on Exhibit 4.

Mr. Gronlund said he also compared Mr. Mendel's irrigation questionnaires against the closest neighboring irrigation water rights in the area (DENR Exhibit 3).

Based on his comparison of neighboring irrigation, Mr. Gronlund concluded that climate was an issue regarding the ability to irrigate in some of the years. For example, 1993 was a historically wet year in the state, and most of the water right holders in that area reported no irrigation. Mr. Gronlund noted that there were some years that other permit holders were irrigating and Mr. Mendel was not.

The chief engineer recommended cancellation of Water Right No. 1504-3 for abandonment and/or forfeiture.

David Mendel, Donald Mendel's brother, was administered the oath by Chairman Holzbauer. Mr. Mendel testified he and Donald Mendel had been farming together for over 25 years. He stated that Donald Mendel is ready to retire and is in the process of transferring his share of the partnership to two of his sons. Mr. Mendel said this process started in 2000.

Mr. Mendel stated that it was never the Mendel's intention to abandon the water permit. He said Mr. Stroup testified that he did not see any irrigation equipment on the property. Mr. Mendel stated that the Mendel's still own all of the irrigation equipment. It is a combination of a power

unit, well, wellhead, tank, several tow lines and assorted piping. The equipment is stored in various locations throughout the property.

Mr. Mendel presented photographs of the well, pump and gear (Exhibit M4), the irrigation power unit and fuel tank (Exhibit M3), irrigation pipe (Exhibit M2), and four quarter-mile tow lines on the edge of a field (Exhibit M1). Mr. Mendel noted that the equipment is not visible from the road.

Mr. Mendel stated that they irrigated with the tow line equipment for a number of years. Tow lines are labor intensive. During the very wet cycle in the 1990's, there were very few years that irrigation would have been beneficial.

Mr. Mendel offered three aerial photographs taken in 1997 of the property and six aerial photographs taken in 2001 of the property (Exhibit M6). The photographs show the amount of water standing on the property. Mr. Mendel stated that this factor along with the labor intensive startups for tow line made it impractical to pursue irrigation. Mr. Mendel said they have looked at the option of placing a center pivot on this property. However, it is impractical because there is not part of the land to which the water is appurtenant which can accommodate a standard sized center pivot. There is an irregular creek and several farmed wetlands on the property.

Mr. Mendel said he and Donald Mendel were under the impression that they had some time from the end of the wet years to get either something developed or something done with this permit. He said in the spring of 2002 and 2003, Don Stroup told the Mendel's that to keep the permit active they needed to do something before the three-year grace period expired. Mr. Stroup and the Mendel's acknowledged that during the wet weather cycle, irrigation was neither necessary nor prudent. Mr. Mendel said he and his brother were operating under the assumption that they still had at least a year to do something with the permit, and they were never notified otherwise.

Mr. Mendel provided Exhibit M5, crop insurance records (prevent plant).

Mr. Mendel asked the board not to cancel the permit.

Mr. Freeman asked Mr. Mendel if it was his testimony that the Mendel's were unable to irrigate in 1995, 1997, and 2001 due to excessive moisture. Mr. Mendel answered that is correct.

Mr. Mendel's exhibits were accepted into the record.

Ms. Best asked Mr. Mendel whether he had any knowledge of irrigation occurring on Sections 14 and 15 under this permit at any time since 1991. Mr. Mendel answered he does not.

Ms. Best asked whether the Mendel's ever talked with an irrigation supplier. Mr. Mendel said they have a number of neighbors who work in that area, and these neighbors were asked what it would take to install a center pivot irrigation system. Mr. Mendel said he owns some property that has a center pivot irrigation system so he is fairly familiar with the operation, the power requirements to move the water. Mr. Mendel said the decision to not install a center pivot on this

property was made based on a combination of the very wet conditions in the 1990's, the partnership being in a state of transition, and financial status.

Responding to questions from Ms. Best, Mr. Mendel said the wet cycle in the early 1990's prompted the Mendels to pull the irrigation pipe from the field and place it in a pile on the old farmstead, so there hasn't been any irrigation pipe in place for quite some time.

Harvey Wollman was administered the oath by Chairman Holzbauer. He testified that he took the photographs (Exhibit M6). These pictures were taken to the northeast of Harrison Township.

Mr. Wollman asked the board not to cancel Water Right No. 1504-3.

Motion by Freeman, seconded by Rollag, to deny the chief engineer's recommendation to cancel Water Right No. 1504-3.

Mr. Freeman stated that undisputed testimony was given showing that there is not a period where irrigation did not take place for three continuous years.

The motion carried.

Ms. Best said the DENR would waive Findings of Fact and Conclusions of Law.

Ms. Guhin suggested that in order to explain its action, the board adopt a Conclusion of Law stating that 46-5-37 does not operate unless there are three years of non-use uninterrupted by a year with legal excuse.

Mr. Freeman agreed, stating that he does not want to mislead anyone into thinking that economics played a part in the board's decision. The board does not consider economics to be a legal excuse.

Representative Dale Hargens questioned whether the three-year rule should be changed to four or five years.

Ms. Gunderson said three years is long enough to not irrigate without a legitimate reason. She noted that usually if there have been three years of non-use the permit will not be revived and it is usually on the basis of economics.

WATER PERMIT APPLICATION NOS. 1504A-3 AND 1504B-3, HARVEY WOLLMAN AND LARRY WIPE: Jim Goodman presented his report on the applications.

Application No. 1504A-3 for Harvey Wollman proposes to transfer 16 acres of irrigated land and 0.55 cfs diversion rate authorized by Water Right No. 1504-3 to Water Permit No. 2729A-3. The total appropriation under Water Permit No. 2729A-3 would be 1.66 cfs for irrigation of 136 acres located in the NW $\frac{1}{4}$ of Section 1, T14N R62W.

Application No. 1504B-3 for Larry Wipf proposes to transfer 136 acres of irrigated land and a diversion rate of 1.66 cfs from Water Right No. 1504-3 to a well located near the center of the SW $\frac{1}{4}$ and 136 acres of land located in the SW $\frac{1}{4}$ of Section 28, T1 15N R61 W.

The chief engineer recommended approval Water Permit Application No. 1504A-3, Harvey Wollman and No. 1504B-3 with the Well Interference Qualification, Well Construction Rule Qualification No. 2 and the Irrigation Water Use Questionnaire Qualification.

Responding to a question from Chairman Holzbauer, Mr. Goodman stated that water can be transferred to each site without impairing existing rights. There is an increased potential for interference at the 1504B-3 site, however, the saturated thickness and distance between production wells should minimize this potential.

Responding to a question from Chairman Holzbauer, Mr. Guhin read SDCL 46-5-34: Irrigation rights appurtenant to land -- Amendment of permit required for severance and transfer. All water used in this state for irrigation purposes shall remain appurtenant to the land upon which it is used. However, if for any reason it should become impracticable to use all or any part of the water beneficially or economically for irrigation of any land to which the right of its use is appurtenant, all or any part of the right may be severed from the land and simultaneously transferred and become appurtenant to other land without losing priority of right previously established, subject to existing rights, upon approval of an application for an amended permit. No increase in total acres irrigated may be allowed under this section.

Mr. Guhin also read SDCL 46-2A-12: Amendment of permit or license -- When granted. An amendment of an existing permit or license may be granted for a change in use, a change in point of diversion or other change only if the change does not unlawfully impair existing rights and is for a beneficial use and in the public interest.

Eric Gronlund noted that the chief engineer's recommendation contains the following Note: If application Nos. 1504A-3 and 1504B-3 are approved, it is the intent of the Water Rights Program to initiate cancellation of the 218 acres of irrigation remaining under Water Right No. 1504-3 and require the well located in the SE $\frac{1}{4}$ of Section 15, T1 15N, R61W to be plugged in accordance with well construction standards. This is due to the fact that the entire diversion rate appropriated by Water Right No. 1504-3 has been transferred to Water Permit Nos. 1504A-3 and 1504B-3.

Mr. Gronlund stated that because No. 1504-3 was transferred to Mr. Wollman and Mr. Wipf, they will have a five-year construction period.

Motion by Freeman, seconded by Gunderson, to approve Water Permit No. 1504A-3, Harvey Wollman, and Water Permit No. 1504B-3, Larry Wipf, subject to the qualifications set forth by the chief engineer. The five-year construction rule applies to these permits. Motion carried.

DEFERRED WATER PERMIT APPLICATION NO. 1248-1, J&S PARTNERSHIP: Eric Gronlund reported that Water Permit Application No. 1248-1 was filed in 1982 by J&S Partnership to appropriate .86 cfs from Bitty Creek, a tributary to Indian Creek northwest of

Newell in Butte County, to irrigate 60 acres. The application was placed on deferred status because of concerns over water availability in the Indian Creek area. This application has remained on deferred status for the past 20 years.

Mr. Gronlund stated that the staff learned from the Butte County Director of Equalization that Diane Anderson now owns the land. In October 2003, the Water Rights Program sent notice to Ms. Anderson regarding the deferred application. In January 2004, Ms. Anderson was provided notice of today's hearing and stating that the chief engineer recommended denial of the application. The basis for the recommendation of denial is because of the ownership issue there is no way to transfer a pending application to another party.

Motion by Gunderson, seconded by Brink, to deny Water Permit Application No. 1248-1, J&S Partnership. Motion carried.

CANCELLATION OF WATER RIGHT NOS. 92-2 AND 987-2, AKER HOSPITALITY: Mr. Gronlund reported that this matter was originally scheduled to be heard at the October 2003 Water Management Board meeting, but Mr. Aker requested an automatic continuance. Mr. Aker also requested a delay at the December 2003 meeting, so the matter was scheduled for the March 2004 board meeting.

Water Right No. 92-2 appropriates 2.1 cfs from Box Elder Creek to irrigate 142.65 acres with a priority date of 1911. Water Permit No. 987-2 appropriates 3.5 cfs from Box Elder Creek and Interstate Draw, to irrigate 245 acres.

Mr. Gronlund stated that Mr. Aker, who was purchasing the property, contacted the Water Rights Program asking about the water right. Staff exchanged correspondence with Mr. Aker informing him of the status of the water right as the staff determined by reviewing past irrigation questionnaires. Mr. Aker pursued purchasing the property.

In August 2003, Don Stroup performed a field investigation of the area and found the land had not been irrigated in several years as evidenced by the large tree growth in the ditches.

Mr. Gronlund provided the board with a photograph of the old irrigation ditch with trees growing in the ditch. From 1986 to the present, the permit holder wrote on the irrigation questionnaires, "we do not irrigate on this farm" or "we are not set up for irrigation on this farm" a number of times.

Based on this information, staff scheduled the permits for cancellation. The landowner initially opposed the cancellation. On March 1, 2004, Mr. Akers' attorney submitted a letter to the Water Rights Program stating that Mr. Akers no longer wished to oppose the cancellation of his water rights.

The chief engineer recommended cancellation of Water Right No. 92-2 and Water Permit No. 987-2.

Water Management Board
March 3, 2004, Meeting Minutes

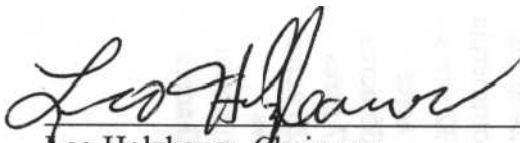
Motion by Freeman, seconded by Gunderson, to cancel Water Right No. 92-2 and Water Permit No. 987-2, Aker Hospitality, due to abandonment and/or forfeiture. Motion carried.

ADJOURN: Chairman Holzbauer declared the meeting adjourned at 3:45 p.m. CST.

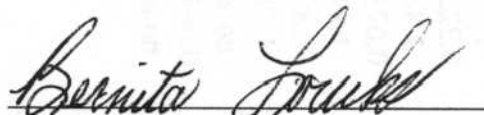
A court reporter was present for this meeting and a transcript of the proceedings may be obtained by contacting Capital Reporting Services, PO Box 903, Pierre, SD 57501; telephone number 605-224-7611.

The meeting was also tape recorded and duplicate cassette tapes may be obtained by contacting the Department of Environment and Natural Resources, 523 East Capitol Avenue, Pierre, SD 57501; telephone number 605-773-3886.

Approved this 12th day of May, 2004.



Leo Holzbauer, Chairman



Bernita Loucks, Secretary

WATER MANAGEMENT BOARD MEETING
March 3, 2004

Qualifications: wi - well interference wcr - well construction rules iq - irrigation questionnaire If - low flow

Unopposed New Water Permit Applications Issued Based on the Chief Engineer Recommendations

No.	Name	Address	County	Amount	Use	Source	Qualifications
1762A-1	Philip Bestgen	Whitewood	ME	no add'l	no add'l	2 wells-Inyan Kara Aquifer	wi, wcr,iq,1 special
1809-1	Fairview Ranch, Inc.	Faith	PK	107 AF	fwp/livestock	runoff	If, 1 special
1810-1	Wilder Elk Ranch	Timber Lake	DW	0.044 cfs	comm/livestock	1 well-Fox Hills Formation	wi
1811-1	Butte Electric Cooperative Inc	Newell	LA	0.033 cfs	commercial	1 well-Minnekahta Limestone	wi, wcr
2510-2	David Enyeart	Hot Springs	FR	0.05 cfs	3 ac & comm.	1 well-Unkpapa Sandstone	wi, iq
2514-2	Craig & Debbie Hanrahan	Philip	HK	5.78 cfs	408 acres	Cheyenne River	If, iq
2515-2	Tripp Co. Water Users Dist.	Winner	TR	3.33 cfs	rws	3 wells-Ogallala Formation	wi, wcr, 2 special
5576A-3	Grant-Roberts Rural Water	Milbank	CD	454 AF	rws	3 wells-Antelope Valley Aqu.	wi, 2 special
6446-3	Central States Fire Appartatus	Lyons	MA	0.44 cfs	ind/fire prot.	1 well-Big Sioux:M Skunk Cr.	wi
6447-3	Dale Swanson	Pukwana	BL	0.056 cfs	dom/livestock	1 well-Dakota Formation	wi, 2 special
6448-3	Dennis Namminga	Springfield	BH	1.77 cfs	124 acres	Missouri River	iq
6449-3	Eastern Farmers Cooperative	Canton	LN	0.222 cfs	commercial	1 well-Dakota Formation	wi, wcr
6450-3	Arlan Jantz	Carpenter	BD	1.88 cfs	132 acres	2 wells-Floyd East James Aqu.	wi,wcr,iq,1 special
6451-3	Bluffs Townhomes Assoc.	Sioux Falls	MA	0.093 cfs	3 acres	1 well-Sioux Quartzite	wi, 1 special
6452-3	Kenneth Thorstenson	Selby	CA	1.89 cfs	135 acres	1 well-Selby Aquifer	wi, iq
6453-3	Roger Hummel	N Sioux City	UN	0.89 cfs	37 acres	1well-Missouri:Elk Point Aqu.	wi,wcr,iq,1 special
6454-3	Daniel Schuurmans	Tyndall	BH	1.71 cfs	120 acres	1 well-Shoteau:Tyndall Aqu.	wi, wcr, iq
6455-3	Minnehaha Community Water	Dell Rapids	MA	no add'l	rws	3 wells-Big Sioux-Sioux Falls	wi, wcr, 2 special
6457-3	Big Sioux Nursery, Inc.	Watertown	CD	0.044 cfs	commercial	1 well-Big Sioux North	wi
6458-3	Paul Young	Yankton	YA	no add'l	40 acres	2 wells-Missouri:Elk Point	wi, iq